

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Optical Telecommunications, Inc.) MB Docket No. 14-258
Complaint Concerning Retransmission of) CSR 8895-C
WXCW(TV), Naples, FL)

To: The Commission

APPLICATION FOR REVIEW OF DISH NETWORK L.L.C.

DISH Network L.L.C. (“DISH”) respectfully submits this application for review¹ of the Media Bureau’s Order on Reconsideration issued on March 20, 2017 in the above-captioned proceeding.² Contrary to the Media Bureau’s assessment, Optical Telecommunications, Inc. (collectively with HControl Corporation, “OpticalTel”) was not a “DBS reseller” for local broadcast televisions stations for the properties at issue during the relevant time period, a determination that led to the Bureau’s erroneous conclusion that DISH, not OpticalTel, should have sought retransmission consent from Sun Broadcasting, Inc. (“Sun”) to retransmit its station, WXCW, to certain of OpticalTel’s customers. Moreover, OpticalTel satisfies the statutory definition of an MVPD, enabling it to negotiate with broadcasters for retransmission consent. OpticalTel’s contract with DISH, in turn, expressly required OpticalTel to obtain Sun’s consent before OpticalTel retransmitted WXCW to its customers, and the Communications Act expressly provides for entities such as OpticalTel to seek and obtain retransmission consent under 47 U.S.C. § 325.

¹ 47 C.F.R. § 1.115.

² *Optical Telecommunications, Inc. Complaint Concerning Retransmission of WXCW(TV), Naples, FL, Order on Reconsideration*, MB Docket No. 14-258, DA 17-265 (MB Mar. 20, 2017) (“*Order on Reconsideration*”).

DISH also respectfully requests that the Commission clarify that any determination as to whether a satellite carrier is providing a retransmission “with respect to [home satellite dish] sales,” and therefore holding itself out as an MVPD, is fact-dependent and should be made on the facts of each case. In the instant case, the record reflects that OpticalTel, and not DISH, was the MVPD with respect to provision of WXCW to OpticalTel’s customers during the relevant time period.

I. DISH’S STANDING, QUESTIONS PRESENTED FOR REVIEW, AND FACTORS THAT WARRANT COMMISSION REVIEW

DISH participated in the proceeding below by responding to the Media Bureau’s letter of inquiry.³ Even if DISH had not participated below, it is entitled to file this application under the Commission’s rules. *See* 47 C.F.R. § 1.115. DISH specifically states that: (a) DISH is aggrieved by conclusions in the *Order on Reconsideration* that mischaracterize the contract between DISH and OpticalTel and both parties’ regulatory obligations under their arrangement; and (b) as a satellite carrier, DISH is aggrieved by the *Order on Reconsideration* to the extent the Order could be interpreted as holding that satellite carriers always hold themselves out as MVPDs, even when their role is not “with respect to [home satellite dish] sales.” DISH had no reason to expect that the Media Bureau would rule in a manner that disregards the phrase “with respect to [home satellite dish] sales” from the Commission’s *Broadcast Signal Carriage Order*.⁴ The Bureau cannot alter this rule when acting on delegated authority.

³ *See* Letter from Alison Minea, DISH, to Marlene Dortch, Secretary, FCC, MB Docket No. 14-258 (Mar. 3, 2016) (“DISH LOI Response”).

⁴ Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, *Report and Order*, 8 FCC Rcd. 2965, 2997 ¶ 131 (1993) (“*Broadcast Signal Carriage Order*”).

II. INTRODUCTION AND BACKGROUND

On December 2014, Sun filed a complaint against OpticalTel with the Commission, alleging that OpticalTel violated Section 325 of the Communications Act by retransmitting the signal of WXCW to subscribers in two residential properties in Florida without the express written consent of Sun, and that OpticalTel refused to negotiate a retransmission consent agreement.⁵ OpticalTel was in the business of providing TV service solutions to residential communities.⁶

Initially, the Media Bureau concluded that OpticalTel retransmitted the signal of WXCW without retransmission consent, thus violating Section 325 of the Communications Act and Section 76.64 of the Commission's rules, but declined to issue a forfeiture.⁷ It based its conclusion on the finding that DISH and OpticalTel were parties to an agreement that obligated the latter to secure retransmission consent. While it acknowledged that the statute of limitations had elapsed, the Media Bureau stated that it would have "decline[d] to issue forfeiture because of the unique circumstances of this proceeding" even if it could.⁸ OpticalTel filed a petition for reconsideration.⁹

On reconsideration, the Media Bureau granted OpticalTel's petition, and dismissed with

⁵ Complaint of SUN Broadcasting, Inc. against Optical Telecommunications, Inc. Concerning Retransmission of WXCW(TV), Naples, FL, MB Docket No. 14-258, at 2 (Dec. 4, 2014).

⁶ *See id.* (stating that, according to OpticalTel's website, OpticalTel "is a 'fully integrated telecable company utilizing advanced fiber optic technology to deliver Video, Internet, and Telephone service all from one source' to residential and business communities in South Florida.").

⁷ *Optical Telecommunications, Inc. Complaint Concerning Retransmission of WXCW(TV), Naples, FL, Order*, 31 FCC Rcd. 8952 (MB Aug. 15, 2016) ("*OpticalTel Order*").

⁸ *Id.* at 8954 ¶ 6.

⁹ *Optical Telecommunications, Inc. and HControl Corporation, Petition for Reconsideration*, MB Docket No. 14-258 (Sept. 14, 2016).

prejudice its previous Order. At issue, according to the Media Bureau, was not whether OpticalTel's agreement with DISH obligated OpticalTel to obtain retransmission consent. The Media Bureau concluded that DISH—and not OpticalTel—was solely responsible for obtaining retransmission consent from WXCW.¹⁰ It quoted the Commission's 1993 statement from its Report and Order in the broadcast signal carriage rulemaking that “to resolve any potential ambiguity regarding responsibility for securing retransmission consent . . . we find that, with respect to [home satellite dish] sales, the satellite carrier is the multichannel distributor and must secure retransmission consent.”¹¹ It also distinguished a footnote in the *Broadcast Signal Carriage Order* stating that “where satellite carriers retransmit television signals to cable systems, the cable operator (and not the satellite carrier) is the MVPD with respect to cable subscribers.”¹² In the Bureau's words:

We agree with OpticalTel that the footnote is an exception to the general rule that the DBS operator remains responsible for obtaining retransmission consent, and that the exception for cable operators is logical given that cable operators (unlike DBS resellers) are themselves MVPDs and thus subject to the retransmission consent requirements and eligible for the compulsory copyright license. Accordingly, the footnote does not alter the Commission's conclusion that a satellite carrier must obtain retransmission consent where it authorizes a reseller to distribute its service.¹³

The Bureau concluded that “[a] DBS operator that provides a broadcast television station signal for distribution by a DBS reseller cannot shift its obligation to obtain retransmission consent by contractually delegating that obligation to the reseller.”¹⁴

¹⁰ *Order on Reconsideration* ¶ 5.

¹¹ *Broadcast Signal Carriage Order*, 8 FCC Rcd. at 2997 ¶ 131 (footnote omitted).

¹² *Id.* ¶ 131 n.367.

¹³ *Order on Reconsideration* ¶ 6 (footnote omitted).

¹⁴ *Id.* ¶ 5.

III. ARGUMENT

A. OpticalTel Was Not a “DBS Reseller” With Respect to WXCW Prior to December 2014

DISH respectfully asks the Commission to vacate the Bureau’s conclusion that DISH was responsible for obtaining retransmission consent from Sun in order for OpticalTel to provide WXCW to its customers prior to December 2014. OpticalTel, and not DISH, was acting as the MVPD with respect to WXCW during the relevant time period, and was therefore subject to the retransmission consent obligation.

Section 325(b)(1)(A) of the Communications Act provides that “[n]o cable system or other [MVPD] shall retransmit the signal of a broadcasting station, or any part thereof, except— with the express authority of the originating station.”¹⁵ Section 522 of the Communications Act, in turn, defines an MVPD as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.”¹⁶

OpticalTel, a company in the business of providing TV service solutions to community managers, was acting as a “television receive-only satellite program distributor.” The Commission directly addressed such a distributor’s right to seek retransmission consent in the 1993 broadcast signal carriage rulemaking, stating that “[satellite master antenna television] systems are, of course, multichannel distributors under the Act” that can “*inter alia*, obtain retransmission consent for any local or distant television broadcast signals (other than

¹⁵ 47 U.S.C. § 325(b)(1)(A).

¹⁶ 47 U.S.C. § 522(13).

superstations) that they deliver via satellite or microwave channels.”¹⁷ And of course, according to the Copyright Office, distributors such as OpticalTel “are cable systems for purposes of section 111,” and therefore eligible for statutory licensing under that section.¹⁸

Instead of reviewing and addressing this precedent, however, the Media Bureau mischaracterized the agreement between DISH and OpticalTel as “authoriz[ing] OpticalTel to *resell* DISH services to customers . . . including the signal of WXCW.”¹⁹ Not so. In fact, the contract between DISH and OpticalTel made it clear that, during the relevant time period, DISH provided *transport only* services with respect to WXCW, among other stations, and that OpticalTel could not, without obtaining consent directly from such stations, retransmit their signals.²⁰

The Bureau’s mischaracterization of OpticalTel as “reselling” WXCW prior to December 2014 under its contract with DISH led the Bureau to treat OpticalTel like the “variety of agents (e.g., program packagers, equipment distributors, and satellite equipment retailers)” used by satellite carriers “to sell the signals on the [satellite carriers’] behalf,”²¹ which the Commission concluded in 1993 were not the relevant MVPD “with respect to [home satellite dish] sales.”²² After receiving WXCW’s signal from DISH, however, OpticalTel retransmitted that signal to the various residents in the communities it served. This is a key distinguishing feature between OpticalTel and the “program packagers, equipment distributors, and satellite equipment retailers”

¹⁷ *Broadcast Signal Carriage Order*, 8 FCC Rcd. at 2998 ¶ 135.

¹⁸ Cable Compulsory Licenses: Definition of Cable Systems, 62 Fed. Reg. 18705, 18707 (Apr. 17, 1997) (to be codified at 37 C.F.R. pt. 201).

¹⁹ *Order on Reconsideration* ¶ 6 (emphasis added).

²⁰ DISH LOI Response (confidential version) at 2, Exhibit D.

²¹ *Broadcast Signal Carriage Order*, 8 FCC Rcd. at 2997 ¶ 131 (footnote omitted).

²² *Id.*

cited in the 1993 order, none of which engaged in any further retransmission. None of these “agents” qualified as MVPDs, none could avail themselves of the transmission consent regime, and none could benefit from statutory copyright licensing. OpticalTel, on the other hand, did qualify as an MVPD and both could and should have availed itself of the retransmission consent regime. OpticalTel was therefore not a mere “DBS reseller” prior to December 2014, the time period during which it purchased transport-only services for WXCW and other local broadcast stations from DISH.²³

B. Any Determination on Whether a Satellite Carrier or Any Other Entity is an MVPD in a Particular Commercial Context is Dependent on the Facts of Each Case

If the *Order on Reconsideration* were read to leave open the implication that satellite carriers hold themselves out as MVPDs in all circumstances, it would depart from Commission policy. The Commission has articulated the applicable standard in its *Broadcast Signal Carriage Order*: “to resolve any potential ambiguity regarding responsibility for securing retransmission consent . . . we find that, *with respect to [home satellite dish] sales*, the satellite carrier is the multichannel distributor and must secure retransmission consent.”²⁴ A satellite carrier may not be acting as an MVPD at times when it may provide service without the use of a home satellite dish—for example, if it provides transport services for another entity that itself has (or needs to obtain) all the necessary rights to make retransmission to the end user.

²³ *Order on Reconsideration* ¶ 3 (“The Bureau determined that the alleged retransmission without consent ceased as of December 12, 2014, because DISH confirmed that as of that date it provided OpticalTel with transport services that included the right to retransmit WXCW’s signal to subscribers in both Sail Harbour and Glades.”).

²⁴ *Broadcast Signal Carriage Order*, 8 FCC Rcd. at 2997 ¶ 131 (emphasis added). The Cable Services Bureau has expanded on the meaning of “HSD sales” by explaining it means sales “directly to home satellite dish (“HSD”) households, i.e., end users.” *World Satellite Network, Inc. v. Tele-Communications, Inc., Satellite Services, Inc., and Netlink USA d/b/a Netlink International, Program Access Complaint, Memorandum Opinion and Order*, 14 FCC Rcd. 13242, 13254 ¶ 26 (1999).

The Commission should clarify that the Bureau may not change that standard, and may not delete the qualifier “with respect to [home satellite dish] sales” from the applicable Commission pronouncement. The Commission should further clarify that any determination as to whether a satellite carrier is a distributor with respect to home satellite dish sales, and therefore holding itself out as an MVPD, is fact-dependent, and that it should be made by closely scrutinizing the details of each case.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the application for review.

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th of April 2017, I caused true and correct copies of the foregoing Application for Review to be served by first class U.S. mail and electronic mail upon the following counsel:

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